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June 22, 2009

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 24, 2009

Case Number: TSO-0708

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should be restored.

**I. Background**

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local DOE security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns.

On January 15, 2009, the local DOE security office (LSO) sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying

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1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f) and (l) (hereinafter referred to as Criteria F and L, respectively). 2/

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented his own testimony and that of six other witnesses. The DOE counsel did not present any witnesses. The individual and the DOE submitted a number of written exhibits prior to and during the hearing.

## **II. Regulatory Standard**

### **A. Individual's Burden**

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

### **B. Basis for the Hearing Officer's Decision**

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2/ Criterion F concerns information that the individual has "misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security Interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." 10 C.F.R. § 710.8(f). Criterion L relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . . ." 10 C.F.R. § 710.8(l).

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

### **III. The Notification Letter and the Security Concerns at Issue**

As stated above, the LSO cites two potentially disqualifying criteria as bases for denying the individual's security clearance, Criteria F and L. To support its reliance on Criterion F, the LSO states that on March 14, 2004, and April 17, 2006, the individual signed and dated a Questionnaire for National Security Positions (QNSP), certifying that he had not used any illegal drugs in the last seven years. Despite this certification, during a personnel security interview (PSI) conducted on September 10, 2008, the individual admitted to using marijuana from 1994 to 1996 and once in 2000. The individual stated that he failed to list his use of illegal drugs on his QNSPs for fear of jeopardizing his security clearance and because he felt it "was not worth listing." *See* Statement of Charges at 1. The LSO also alleges that during a PSI conducted on September 10, 2008, the individual acknowledged that his "L" access authorization was granted based on false information in his 2004 QNSP. Also, during this 2008 PSI, the individual acknowledged that he signed Security Acknowledgments in his 2004 and 2006 QNSPs despite knowing that the information he provided was incorrect and could result in the loss of his access authorization. *Id.*

From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House.

As for Criterion L, the LSO alleges that during a September 2008 PSI, the individual admitted to engaging in fraudulent activity by using his friend's driver's license to enter liquor establishments, obtain alcohol, and gamble while he was under the age of 21. *Id.* at 2. The individual admitted to participating in this activity despite knowing it was illegal. *Id.* With regard to Criterion L, the LSO also alleges that the individual acknowledged that he signed Security Acknowledgments in his 2004 and 2006 QNSPs despite knowing that the information he provided was incorrect and could result in the loss of his access authorization. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

### **IV. Findings of Fact**

The individual used marijuana from the eighth to the tenth grade approximately four to seven times. *See* DOE Exh. 3 at 6. According to the individual, he usually used marijuana in the form of smoking a “joint” while at a friend’s house. *Id.* The individual stated that he used marijuana on one more occasion in the winter of 2000 while he was in college. *Id.*, Transcript of Hearing (Tr.) at 127. He stated that he wanted to try marijuana one last time before he graduated and began a career. *Id.*

The individual began working for DOE in 2004. In March 2004 and April 2006, the individual submitted QNSPs in connection with an investigation of his eligibility to hold a security clearance. On the QNSPs, the individual was asked, *inter alia*, the following: “Since the age of 16 or in the last seven years, whichever is shorter, have you illegally used any controlled substance . . . .” DOE Exh. 6 and 7. The individual checked “no” to this question because he felt that, with the exception of a one-time use in 2000, his use was outside of the seven-year requirement. *Id.*

During a PSI with the individual in September 2008, the individual admitted that he omitted his drug use for fear of jeopardizing his security clearance. DOE Exh. 8. He further indicated that because he used marijuana on one occasion in 2000 and because it was “a long time ago,” he felt it was not worth listing since he “does not do drugs.” *Id.* Further, during the PSI, the individual admitted that he should have listed his drug use on his QNSPs and also admitted that he was granted an “L” clearance based on his 2004 QNSP which contained erroneous information. *Id.* In addition, the individual signed Security Acknowledgments certifying that his answers on his QNSPs were true. However, he omitted his illegal drug use in 2000. During the course of his 2008 PSI, the individual also admitted to fraudulently using a friend’s driver’s license to purchase alcohol. According to the individual, a friend who looked like the individual allowed the individual to borrow his driver’s license to enter liquor establishments and buy alcohol about five times in high school and college. The individual stated that he did this to be “cool” even though he knew it was illegal. *Id.*, Tr. at 137.

## **V. Hearing Officer Evaluation of the Evidence**

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In considering this question, I found that the nature of the individual’s omissions was serious. The individual’s lack of candor concerning his marijuana use could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful. This important principle underlies the criteria set forth in 10 C.F.R. § 710.8(f).

During the hearing, the individual was questioned about the omissions on his 2004 and 2006 QNSPs. The individual admitted that the last time he used marijuana was in late 2000 with three friends and that he has not used marijuana since that time. Tr. at 127. The individual further admitted that when he completed his QNSPs and was asked whether in the last seven years he had used an illegal substance, he incorrectly answered “No” to the question. *Id.* at 134. When questioned about why he omitted his one-time marijuana usage in 2000 from his QNSPs, the individual testified that at the time he completed the QNSPs he did not recall the one-time usage when he was a junior in college. *Id.* at 135. He further testified that it was not until the background investigator repeatedly questioned

him that he remembered. *Id.* The individual explained that “you saw people in college that smoked marijuana, it just never appealed to me, and then I remembered there was this one last time . . . junior year, where I said that I’m going to become a professional, so I’m going to have one last hurrah with this, because I know pretty much any professional job requires a drug test, so I wanted to stay extremely clean for my senior year as I started interviewing.” *Id.* The individual further testified that he regrets not including this usage in his QNSP and that he did not feel that he had anything to hide regarding this incident. *Id.* According to the individual, he takes full responsibility for his omission. He testified that his erroneous answers on his QNSPs were not intentional and he intends to be totally honest in the future. *Id.* at 161. He reiterated that he no longer uses marijuana or any other drug. *Id.* at 145.

After considering all of the evidence before me, I find that the individual has mitigated the security concerns arising from omissions on his 2004 and 2006 QNSPs regarding his marijuana usage. I found the individual’s testimony that he did not intentionally or deliberately falsify his QNSPs to be very credible. During the hearing, the individual was questioned about what appears to be an inconsistency in the record when he admitted that he omitted his drug use for fear of jeopardizing his security clearance and his testimony that he forgot about his 2000 usage and did not deliberately omit the usage. However, during the hearing, the individual attempted to clarify these statements and adamantly testified that he did not remember his one-time usage in 2000 until he was repeatedly questioned by an investigator. I believe it is plausible that the individual forgot about his one-time usage in 2000. <sup>3/</sup> Moreover, the individual acknowledged and accepted full responsibility for his omissions. He also appeared to be deeply remorseful for his omissions on his QNSPs. It was my observation during the hearing that the individual was well-prepared and took the proceeding seriously. He also understands the importance of being completely honest with the DOE. His witnesses, which included several managers, a co-worker, a friend and an ex-fiancee, corroborated his testimony and all persuasively testified that the individual is an honest, trustworthy and reliable person. One witness, the individual’s current manager, provided particularly compelling testimony that the individual is a dedicated and conscientious employee whose reliability, honesty and integrity place him in the top five percent of all of her employees. *Id.* at 89-93. The individual’s former fiancee, who has known the individual for six years (and is the mother of the individual’s five-year old daughter) convincingly testified that the individual is an honest, responsible person. *Id.* at 22-24. Finally, the individual testified that he has an unblemished employment record, that he is an honest and trustworthy person, and that he has not intention of omitting any information in the future. *Id.* at 149-150. For the foregoing reasons, I find the individual has mitigated the security concerns raised by Criterion F.

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<sup>3/</sup> Having accepted that the individual did not remember his one-time marijuana use, I distinguish this case from other OHA decisions regarding falsifications where the individual knowingly maintained a falsehood for a period of time. In those cases, the individual’s pattern of responsible conduct is compared to the length of time the individual maintained a falsification. *See Personnel Security Hearing*, Case No. TSO-0394 (2006) (six months of honest behavior not sufficient to mitigate dishonesty that spanned for nine months); *Personnel Security Hearing*, Case No. TSO-0302 (2006) (10 months of honest behavior not sufficient to mitigate falsehood that spanned 16 years); *Personnel Security Hearing*, Case No. VSO-0440 (2001) (18 months of responsible, honest behavior sufficient evidence of reformation from dishonest that spanned six months in duration).

With respect to Criterion L and the LSO's security concern that the individual admitted to fraudulently using his friend's driver's license to purchase alcohol and gamble while he was under the age of 21, the individual acknowledged this activity and convincingly testified that he regrets using a fake identification as a minor in high school and college. *Id.* at 138. The individual further testified that when he turned 21, he destroyed the identification. *Id.* While this activity clearly raises serious questions about the individual's judgment, honesty, reliability and trustworthiness, I believe the sum of the evidence mitigates those concerns. First, the individual, who is now 28 years old, demonstrated through his testimony that he has greatly matured since college and now takes full responsibility for his actions. He testified that he shares support of his daughter and takes his responsibilities as a father seriously. *Id.* at 120. The individual provided the testimony of six character witnesses who all provided corroboration that he is now a mature, responsible individual. I believe the individual's testimony, as well as the corroboration he provided during the hearing, have allayed the security concerns under Criterion L. Likewise, with respect to the LSO's concern that he signed Security Acknowledgments in his QNSPs despite knowing that the information he provided was incorrect and could result in the loss of his access authorization, the individual testified that he deeply regrets providing incorrect information and now understands the importance of being totally honest with the DOE. I believe the individual's maturity, life experiences as a responsible father and employee and remorse demonstrate to me that he will no longer employ the poor judgment he relied on when he completed the QNSPs and signed the Security Acknowledgments, and that he will scrupulously follow the DOE rules in the future. After considering the "whole person," I am convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See* Adjudicative Guidelines at (2)a. I therefore find that the individual has sufficiently mitigated the LSO's concerns under Criterion L.

## **VI. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has brought forth convincing evidence to mitigate the security concerns associated with Criteria F and L. I therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman  
Hearing Officer  
Office of Hearings and Appeals

Date: June 22, 2009

